

Appendix L:

Draft Programmatic Agreement

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Among the

U.S. Army Corps of Engineers, Omaha District;

Colorado State Historic Preservation Officer;

Advisory Council on Historic Preservation; U.S. Forest Service; and

Denver Water

**Regarding Compliance with the National Historic Preservation Act for
Construction and Operation of the Enlargement of Gross Reservoir and the
Gross Reservoir Hydroelectric Project, Boulder County, Colorado**

WHEREAS, the U.S. Army Corps of Engineers (Corps), the lead agency in the process of preparing a Final Environmental Impact Statement (EIS) for the Moffat Collection System Project (Project) and by which a Section 404 Permit may be issued, has determined that the construction and operation of the Project may have an adverse effect upon properties eligible for inclusion and/or listed in the National Register of Historic Places (NRHP); and

WHEREAS, the Corps has consulted with the Colorado State Historic Preservation Officer (SHPO), the U.S. Forest Service (USFS), Arapaho & Roosevelt National Forests, the Advisory Council on Historic Preservation (ACHP), and Boulder County Historic Preservation Advisory Board (BCHPAB), collectively referred to herein as “Agencies;” and

WHEREAS, the Corps has consulted with interested American Indian Tribes pursuant to Section 800.14(b) of the regulations (36 Code of Federal Regulations [CFR] Part 800) implementing Section 106 of the National Historic Preservation Act of 1966, as amended (NHPA) (16 United States Code [U.S.C.] 470(f)). The Northern Arapaho Tribe, Northern Cheyenne Tribal Council, Cheyenne-Arapaho Tribes of Oklahoma, the Southern Ute Indian Tribe, Ute Mountain Tribe, and their associated Tribal Historic Preservation Officers (THPOs) (collectively referred to herein as “Tribes”) are invited to concur in this Programmatic Agreement (Agreement); and

WHEREAS, the Corps has consulted with the BCHPAB and has invited them to be a concurring party to this Agreement; and

WHEREAS, the City and County of Denver, acting by and through its Board of Water Commissioners (Denver Water), holds a license from the Federal Energy Regulatory Commission (FERC) to generate power from the hydroelectric facilities within the Project boundary at Gross Reservoir, and the FERC has participated in consultation and was invited to concur in this Agreement; and

WHEREAS, the USFS has management jurisdiction over all lands reserved as National Forest System Land, and therefore has the responsibility for cultural resources management within the Project boundary, and the USFS has participated in consultation and was invited to concur in this Agreement; and

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WHEREAS, Denver Water has submitted a Section 404 Permit application to the Corps for the enlargement of Gross Reservoir (Project) and will submit a license amendment application to the FERC, and the Corps has informed the parties to this Agreement of the Project and made the National Environmental Policy Act of 1969, as amended (NEPA) documents available for their inspection and review; and

WHEREAS, the Corps will be responsible for administering this Agreement: and

WHEREAS Denver Water, which has participated in this consultation and has been invited to enter into this Agreement, will be financially responsible for carrying out the terms of this Agreement; and

NOW THEREFORE, the Signatories to this Agreement agree that the proposed undertaking shall be administered in accordance with the following stipulations to ensure compliance with Section 106 of NHPA.

STIPULATIONS

A. Notification and Coordination

As the lead Federal agency, the Corps will notify and coordinate with the Agencies and Tribes for actions and issues that involve the Agencies and Tribes. The Corps' notification and coordination with the USFS will typically involve actions and issues related to USFS-owned property around Gross Reservoir.

B. Inventories

B.1. The Corps, in coordination with Denver Water, shall ensure that appropriate cultural resource inventories are conducted within the Area of Potential Effects (APE). The APE was determined by compliance with 33 CFR 325 Appendix C, Procedures for the Protection of Historic Properties, and is shown in the attached figure. These inventories will be conducted by the Corps' or any contractor authorized by the Corps prior to any ground-disturbing activities. The inventories will be conducted in a manner consistent with the Secretary of the Interior's *Standards and Guidelines for Identification* (48 Federal Register [FR] 44720-23).

B.2. The Corps will ensure that the inventories are conducted in consultation with the Agencies and Tribes. Inventory reports and site forms will conform to SHPO's guidelines. Site forms will only be prepared when sites are found within a survey area. Draft inventory report and site forms will be submitted by the Corps to the Agencies, Tribes, and Denver Water for a 30-day review and comment period. As appropriate, comments received by the Corps will be resolved. If the Agencies do not respond to the Corps within 30 calendar days from receipt of the submittal, the Corps shall assume no comment on the Corps' findings and recommendations as detailed in the submittal. A Final Inventory Report, including site forms, will be distributed by the Corps to the Agencies, Tribes, and Denver Water.

- B.3. Information gathered during inventory shall be adequate to allow assessment of cultural resources' eligibility for the NRHP. The Corps shall evaluate all cultural resources identified within the APE in accordance with 36 CFR Part 800.4(c). The Corps will consult with the SHPO to determine the eligibility of identified cultural resources pursuant to 36 CFR Part 800.4(c). If the inventory results in the identification of properties that are eligible for the NRHP, the Corps shall comply with 36 CFR Part 800.5.
- B.4. The Corps will ensure that any subsurface evaluative testing is limited to defining the nature, density, and distribution of materials in potential historic properties, and provides adequate data to make evaluations of NRHP eligibility.

C. Treatment

- C.1. The Corps shall apply the criteria of adverse effect to historic properties identified in the APE, in accordance with 36 CFR Part 800.5, and require appropriate mitigation wherever there are adverse effects. The Corps shall work with Denver Water to avoid or minimize adverse effects to historic properties, to the extent practicable, through design of Project facilities, relocation of Project facilities, or by other means.
- C.2. Where the Corps determines that avoidance or minimization is not feasible or prudent, the Corps shall ensure that Denver Water develops a treatment plan designed to mitigate adverse effects to the historic properties. A treatment plan will be prepared, in consultation with the SHPO, which considers effects to eligible cultural resources where avoidance is not feasible. The plan shall consider the full range of cultural resource types (i.e., historic and prehistoric site types) and the kind of information that each type could be expected to produce. The plan shall consider the Project context (i.e., reservoir basin, reservoir shoreline, facilities, etc.) and the type of effects that could occur within these contexts (i.e., inundation, wave action, blading, etc.). Appropriate data recovery methods and/or *in situ* conservation practices will be proposed accordingly. Provisions for unanticipated discoveries and for a pre-work meeting with the Project contractor in order to provide information on the identification of buried cultural resources shall be included within the treatment plan. Denver Water shall submit the draft treatment plan to the Corps. The Corps will distribute the draft treatment plan to the Agencies and Tribes for their comments. As appropriate, comments received by the Corps will be resolved. If no comments are received within 30 calendar days, the Corps shall assume concurrence with the draft treatment plan. For properties eligible under Criterion D (36 CFR Part 60.4), alternative forms of mitigation may be negotiated with the appropriate parties to this Agreement in lieu of, or in addition to, data recovery (e.g., monitoring, *in situ* protection, archival research, etc.).
- C.3. When archaeological data recovery is the preferred option for an historic property or properties, the Corps shall ensure that Denver Water develops a plan for the recovery of significant archaeological data based on an appropriate research design. The research design shall be developed after all appropriate cultural resource inventory and evaluation work is completed. Data recovery plans shall be consistent with the Secretary of the Interior's *Standards and Guidelines for Archaeology and Historic Preservation* (48 FR 44716-37) and shall be implemented prior to any ground disturbance in the vicinity of the historic property(ies). After reviewing Denver Water's data recovery plan

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for adequacy, the Corps shall submit the data recovery plan to the Agencies and Tribes for review and comments. As appropriate, comments received by the Corps will be resolved. If the Agencies or Tribes do not respond to the Corps within 30 calendar days of receipt of the submittal, the Corps shall assume concurrence with the Corps' findings and recommendations as detailed in the submittal.

- C.4. If any of the Agencies or Tribes objects to all or part of the proposed treatment or data recovery plan, the Corps shall attempt to resolve the objection pursuant to Stipulation H and shall make the final decision regarding such dispute. Upon completion of the dispute resolution process, the Corps shall ensure that the treatment or data recovery plan and any modifications to it resulting from the resolution effort are implemented.
- C.5. The Corps shall ensure that all records and materials resulting from identification and treatment efforts on public lands are curated consistent with 36 CFR Part 79 and the provisions of the Native American Graves Protection and Repatriation Act (NAGPRA), if appropriate. Documentation of compliance with 36 CFR Part 79 or NAGPRA shall be provided by Denver Water to the Corps, the Agencies, and Tribes.
- C.6. The Corps will encourage private landowners through written communication to curate any collections from their lands associated with treatment and discovery in an appropriate facility. If any such collections are to be returned to the landowner(s), said collections will be maintained as per 36 CFR Part 79 or according to Colorado State standards until an analysis is completed.
- C.7. The Corps shall ensure that all final reports resulting from actions pursuant to this Agreement are provided to the Agencies and Tribes, and submitted to the National Technical Information Service. The Corps shall ensure that all such reports are responsive to contemporary professional standards and to the Department of the Interior's *Formal Standards for Final Reports of Data Recovery Program* (42 FR 5377-79). Precise locational data will not be made available to the general public.

D. Discovery Situations

- D.1. When cultural resources not previously identified are discovered during the conduct of ground-disturbing activities, or when a previously identified historic property is affected in an unanticipated (accidental) manner, all activities within 100 feet of the discovery shall cease immediately, the site will be secured, and Denver Water shall notify either the Corps' Field Office or the District Office. The Corps will ensure that the discovery is evaluated and recorded by a professional archaeologist, as defined in Stipulation E.
 - D.1.1. Should the remains be determined by a qualified archaeologist to include American Indian skeletal materials and any associated funerary objects, the Corps and the USFS if appropriate, will comply with NAGPRA, Colorado State law, as well as Section 106 of the NHPA. The Corps and the USFS if appropriate, will notify the appropriate Tribes and offer opportunities to visit the discovery site. Those Tribes who express an interest in the remains will be consulted. Appropriate treatment and/or repatriation options will be discussed.

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All potential claims and disputes with regard to the remains will be considered in accordance with the NAGPRA and Colorado State law.

- D.1.2. Should the remains be determined through available evidence to not include American Indian skeletal elements, the remains shall be curated at the designated curation facility.
- D.1.3. Ground-disturbing activities at the scene will not recommence without express written permission of the Corps' Denver Regulatory Office. This permission will not be issued until the completion of site-specific consultation with the SHPO and appropriate Tribes.
- D.1.4. Colorado Revised Statute (C.R.S.) 24-80-1301-1305 Part 13, Unmarked Human Graves, provides procedures regarding the discovery of human remains on State and private lands. Should such a discovery take place on State or private lands, Denver Water will contact the county coroner and sheriff (see below for contact information), who will determine whether the remains are of forensic value. If the coroner determines that the remains are not of forensic value, the State Archaeologist will be notified and will take the appropriate steps to determine whether the remains are over 100 years old and if they are American Indian. If found to be American Indian, the State Archaeologist will contact the Colorado Commission of Indian Affairs, who in turn will contact interested Tribes in the region before removal. The State Archaeologist shall submit a notice in the Federal Register as soon as possible. The Corps will approach the landowner(s) with a letter of consent, allowing for the respectful and dignified treatment of any American Indian skeletal materials in consultation with any interested Tribes. The letter will also request that any such remains be briefly examined by a qualified archaeologist and physical anthropologist.

BOULDER COUNTY	
Coroner	Sheriff
Coroner Emma R. Hall 1777 6 th Street, P.O. Box 471 Boulder, CO 80306 303-441-3535 or 303-441-4444 bouldercountycoroner@bouldercounty.org	Sheriff Joe Pelle 5600 Flatiron Parkway Boulder, CO 80301 303-441-3600 or 303-441-4605 jpelle@bouldercounty.org
STATE ARCHAEOLOGIST	
Main Contact	Alternate Contact
Dr. Richard Wilshusen State Archaeologist/Deputy SHPO-Archaeology History Colorado 1200 Broadway Denver, CO 80203 303-866-2736 richard.wilshusen@state.co.us	Kevin Black Staff Archaeologist History Colorado 1200 Broadway Denver, CO 80203 303-866-4671 kevin.black@state.co.us

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- D.2. The Corps will notify the Agencies and Tribes where the discovery may affect or has affected an historic property. The Corps shall consult with the Agencies and Tribes to seek initial comments regarding the discovery and determine whether testing is needed to evaluate significance.
- D.3. If the Corps determines, in consultation with the Agencies and Tribes, that testing is needed to determine significance, the Corps shall notify the ACHP and will provide the proposed mitigation measures to the Agencies, Tribes, and Denver Water, and request comments regarding the adequacy of the proposed effort to be provided within a timely fashion. As appropriate, comments received by the Corps will be resolved. If the Agencies, Tribes, or Denver Water do not respond to the Corps within 30 calendar days of receipt of the submittal, the Corps shall assume concurrence with the Corps' findings and recommendations as detailed in the submittal. Upon receipt of and in consideration of their comments, the Corps shall notify the Agencies, Tribes, and Denver Water of action necessary prior to resumption of construction.
- D.4. In the event that the Agencies, Tribes, or Denver Water object to the actions proposed for treating a discovery, the Corps shall work to resolve the objection in accordance with Stipulation H.
- D.5. Construction activities in the vicinity of the discovery shall not resume until Denver Water has been notified by the Corps that discovery mitigation is complete and activities can resume.
- D.6. The Corps shall ensure that any human remains are treated under the following terms, pursuant to Colorado State Law (C.R.S. 24-80-1302):
 - D.6.1. The appropriate Corps' Field Office Manager and Staff Archaeologist will be notified by Denver Water or field archaeologist of the location of the suspected human remains. This will be done within 24 hours of discovery. Appropriate notification may include voice mail or electronic mail for those instances when Corp' offices are closed.
 - D.6.2. Should there be ground-disturbing activities in progress in the general area, all work must cease immediately within 100 feet of the discovery location. Protective measures, such as covering the area with a tarp and fencing, will be implemented as necessary to prevent deterioration of, or further damage to, the remains and the area associated with those remains.
 - D.6.3. The Corps will notify law enforcement agencies, as appropriate, the State Archaeologist, Tribes, and the USFS. Law enforcement must be offered an opportunity to visit the scene and determine if they wish to conduct an investigation. Until law enforcement formally releases the scene, the discovery location shall be considered a crime scene under the direct supervision of said law enforcement personnel. The Corps' staff archaeologist or designated field archaeologist can advise law enforcement personnel regarding protective measures and information collection techniques. Upon notification that law

enforcement has no interest in the matter, the following procedures will be implemented:

- D.6.3.1. The Corps will notify the State Archaeologist and, if appropriate, the USFS, of the release of the scene as a potential crime scene. The Corps shall request advice as to measures to protect the remains and proceed to do so, and will collect sufficient information to complete consultations.
- D.6.3.2. The Corps will first assess whether or not human remains are indeed present. If law enforcement has been involved in the Project as per the above steps, it is likely that the remains have been identified as human. The Corps will consult with the State Archaeologist and Tribes to determine the appropriate steps, as necessary, to retrieve basic information with a minimum of disturbance to the remains, with particular focus on evidence of cultural affiliation or cultural patrimony. The intent is to gain the necessary information in a non-destructive fashion.

E. Qualifications

- E.1. The Corps shall ensure that all historic, architectural, ethnographic, and archaeological work conducted pursuant to this Agreement is carried out by or under the direct supervision of persons meeting qualifications set forth in the Secretary of the Interior's *Professional Qualifications Standards* (36 CFR Section 61) and in consultation with Agencies, Tribes, and Denver Water.
- E.2. Denver Water, in cooperation with the Corps, Agencies, and Tribes, shall ensure that all of its personnel and all the personnel of its Project contractors are directed not to engage in collection of historic and prehistoric materials (e.g., old bottles and cans, projectile points, pottery, etc.) and to exercise caution to prevent inadvertent damage to cultural resources. All environmental inspectors will receive training by qualified cultural resources professionals prior to initiation of construction regarding cultural resources that could be discovered during the course of construction. All personnel involved in Project construction, construction zone rehabilitation, operation, and maintenance of the Project facilities will be instructed prior to initiation of construction on site avoidance and protection measures, including information on the statutes protecting cultural resources.

F. Annual Monitoring Reports and Final Report

- F.1. The Agencies may monitor actions carried out pursuant to this Agreement, and the ACHP shall review such actions when so requested. Denver Water shall submit an Annual Monitoring Report to the Corps, Agencies, and Tribes on or before December 31st of each calendar year once the Project has been authorized by the Corps, and a Special Use Permit has been issued to Denver Water by the USFS, if needed. This report will be designed to inform the parties to this Agreement of action taken during the previous year pursuant to this Agreement, and shall provide the basis for any amendments or other actions the parties may deem necessary for purposes of compliance with Section 106. The

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Monitoring Report will be submitted annually until Project construction is complete. The Final Monitoring Report will state that all Project construction has been completed. A meeting of the Signatories shall occur upon request of a Signatory to evaluate the implementation of the stipulations of this Agreement. Failure to submit the Annual Monitoring Report to the Corps, Agencies, and Tribes each calendar year may result in the termination of this Agreement.

- F.2. A Final Summary Report of all inventories, treatment, discovery situations or other mitigative activities will be submitted by Denver Water to the Corps. The Corps will distribute this Final Summary Report to the Agencies and Tribes within 12 months after completion of the Project, unless otherwise agreed to among the parties to this Agreement.

G. Dispute Resolution

- G.1. Should any party to this Agreement object in writing to the Corps regarding any action carried out or proposed with respect to the Project or implementation of this Agreement, the Corps shall consult with the objecting party to resolve the objection. If, after initiating such consultation, either party determines that the objection cannot be resolved through consultation, the Corps shall submit all relevant documentation to the ACHP, including the Corps' proposed response to the objection. Within calendar 30 days after receipt of all pertinent documentation, the ACHP shall exercise one of the following options:
- G.1.1. Advise the Corps that the ACHP concurs in the Corps' proposed response to the objection, whereupon the Corps will respond to the objection accordingly;
 - G.1.2. Provide the Corps with recommendations, which the Corps shall take into account in reaching a final decision regarding its response to the objection; or
 - G.1.3. Notify the Corps that the objection will be referred for comment pursuant to 36 CFR Section 800.7(c) and proceed to refer the objection and comment. The resulting comment shall be taken into account by the Corps in accordance with 36 CFR Section 800.7(c)(4) and Section 110(1) of the NHPA.
- G.2. Should the ACHP not exercise one of the above options within 30 calendar days after receipt of all pertinent documentation, the Corps may assume the ACHP's concurrence in its proposed response to the objection.
- G.3. The Corps shall take into account any ACHP recommendation or comment provided in accordance with this stipulation with reference only to the subject of the objection; the Corps' responsibility to carry out all actions under this Agreement that are not the subjects of the objection shall remain unchanged.

H. Amendment

Any Signatory to this Agreement may request that this Agreement be amended, whereupon the parties to this Agreement will consult in accordance with 36 CFR Section 800.14 to consider such amendment.

I. Termination

Any Signatory to this Agreement may terminate this Agreement by providing 30-calendar-days' notice to the other parties to this Agreement, provided that the parties will consult during the period prior to termination to seek agreement on amendments or other actions that would avoid termination. In the event of termination, the Corps will comply with 36 CFR Sections 800.3 through 800.7 with regard to individual actions covered by this Agreement.

J. Execution

J.1. Execution and implementation of this Agreement evidences that the Corps has afforded the ACHP a reasonable opportunity to comment on the proposed Project and its effects on historic properties, and that the Corps has satisfied its Section 106 responsibilities for all individual actions associated with the proposed Project.

J.2. In the event that the Corps does not carry out the requirements of this Agreement, the Corps shall comply with 36 CFR Sections 800.3 through 800.7 with regard to individual actions covered by this Agreement.

J.3. This Agreement shall become effective when the Signatories have all signed below, on the date of the last signature of those parties.

K. Sovereign Immunity

The Signatory Parties do not waive their immunity by entering into this Agreement, and each fully retains all immunities and defenses provided by law with respect to any action based on or occurring as a result of this Agreement.

L. Expiration of Agreement

This Agreement shall expire 10 years after execution of this document or upon completion of the proposed Project, whichever occurs first. If any Signatory wishes to extend this Agreement, a letter requesting that extension must be transmitted through the Corps to the other Signatories at least 90 calendar days prior to the expiration date. The Corps will then consult with the other Signatories to determine the outcome of such a request.

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SIGNATORIES

<i>Martha S. Chieply</i> <i>Chief</i> U.S. ARMY CORPS OF ENGINEERS	Date
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<i>Edward C. Nichols</i> <i>Colorado State Historic Preservation Officer</i> HISTORY COLORADO	Date
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<i>John Fowler</i> <i>Executive Director</i> ADVISORY COUNCIL ON HISTORIC PRESERVATION	Date
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<i>Glenn P. Casamassa</i> <i>Forest Supervisor, Arapaho & Roosevelt National Forests</i> U.S. FOREST SERVICE	Date
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<i>Jim Lochhead</i> <i>CEO and Manager</i> BOARD OF WATER COMMISSIONERS (DENVER WATER)	Date
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CONCURRING PARTIES

Designated Representative
NORTHERN ARAPAHO TRIBE

Date

Designated Representative
NORTHERN CHEYENNE TRIBAL COUNCIL

Date

Designated Representative
CHEYENNE-ARAPAHO TRIBES OF OKLAHOMA

Date

Designated Representative
SOUTHERN UTE INDIAN TRIBE

Date

Designated Representative
UTE MOUNTAIN TRIBE

Date

Karen Hagler
Chair
BOULDER COUNTY HISTORIC PRESERVATION ADVISORY BOARD

Date

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